In the High Court of Judicature at Madras

Dated: 01/10/2004

Coram

The Hon'ble Mr. Justice P. Sathasivam
and
The Hon'ble Mr. Justice S.K. Krishnan

O.S. Appeal No.160 of 2000 and O.S. Appeal No. 161 of 2000

The Chief Engineer
Chennai Port Trust
Rajaji Salai
Chennai 600 001. .. Appellant in both appeals.

-Vs-

1. M/s. Amudha Engineer Co., Ltd.,
Engineering Contractors
No.261 Second Main Road
Sree Venkateswara Nagar
Ramapuram, Chennai 600 089.
2. S. Sethumadhavan
Presiding Arbitrator
D7, MGM Reddamma Apartments
44A, Arcot Road, Virugambakkam
Chennai 600 092.
3. T. Umapathy
Convener Arbitrator
No.100, 3rd Street
Karpagam Avenue
Chennai 600 028.
4. T.V. Ranganathan
Joint Arbitrator
14, I Main Road
Indira Nagar
Chennai 600 020.
5. Canara Bank
G.P. Road Branch rep. by its
Prl. Officer / Chief Manager
Mr. Srinivasan
110 G.P. Road, Chennai 2.
(R.5 has been impleaded as per the
order of the Court dt.11.7.2001
made in CMP.8863 & 8864/01
dated 11.07.2001) .. Respondents in both appeals

Original Side Appeal Nos.160 and 161 of 2000 are preferred

against the common order dated 31.01.2000 passed in O.P.Nos.305 and 518 of 1999.

!For appellant : Mr. R.S. Jeevarathinam

^For respondents : Mrs. Nalini Chidambaram
Senior Counsel
for Mr. M. Rajaraman for R.1

Mr. P. Benjamin George for R.5

:COMMON JUDGMENT

(Judgment of the Court was delivered by P. Sathasivam,J.,)

Chennai Port Trust is the appellant in the above appeals. The above O.S. Appeals are filed against the common order dated 31.01.2000 made in O.P.Nos.305 of 1999 and 518 of 1999. O.P.No.305 of 1999 is filed by the Chief Engineer, Chennai Port Trust under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the Act") against the interim award passed by the Arbitral Tribunal dated 03.12.1998 and O.P.No.518 of 1999 is against the final award passed in the said O. P., dated 24.04.1999.

2. Since the issue raised in both the appeals are inter-connected and one and the same, the appeals are being disposed of by the following common judgment. For convenience, we shall refer to the parties as arrayed before the learned single Judge.

3. The petitioner - Chennai Port Trust called for tenders for construction of Eastern Wall of Boat Basin. Among the tenders, the first respondent - Contractor herein was successful and its offer was accepted by the petitioner. The period fixed for completion of the work was 18 months. The work was awarded to the first respondent on 31.08.1994. The site was taken over on 23.09.1994. It is not in dispute that the first respondent also availed mobilisation advance of Rs.25,7 2,112/- on 04.01.1995 and pre-installation charges of Rs.5 lakhs on 1 1.10.1994. Thereafter, dispute arose between the parties with regard to execution of the work in terms of agreement, for which three Arbitrators were appointed as Arbitral Tribunal in May, 1998. The first respondent filed a claim petition and the petitioner also filed a counter as well as their counter claim. Based on the request of the first respondent and on their application dated 04.06.1998, the Arbitral Tribunal, on 07.11.1998 passed an interim award for Rs.5,72,389.75, against which the petitioner has filed O.P.No.305 of 1999. The Arbitral Tribunal passed the final award on 24.04.1999. Total claim made by the first respondent - contractor was Rs.217.49 lakhs and total counter claim made by the Port Trust was Rs.100.40 lakhs. The award passed by the Arbitral Tribunal in favour of the contractor - first respondent is for Rs.58,87,300/- together with interest at 18% per annum. The Tribunal has rejected all counter claims in the final award dated 24.04.1999. As said earlier, Chennai Port Trust has filed O.P. No.518 of 1999 against the final award. Both the matters were heard together by the learned Single Judge of this Court. After considering

the claims of both the parties and the awards of the Tribunal, by order dated 31.01.2000, the learned Judge dismissed both the Original Petitions as devoid of merits. Against the said common order, the Chennai Port Trust has preferred the above appeals.

4. Heard Mr. R.S. Jeevarathinam, learned counsel for the appellant - Chennai Port Trust and Mrs. Nalini Chidambaram, learned senior counsel for the first respondent - contractor.
5. Mr. R.S. Jeevarathinam, learned counsel appearing for the appellant after taking us through the claims of both the parties, agreement dated 31.08.1994 and awards passed by the Arbitral Tribunal, would contend that inasmuch as the final Arbitral award is in conflict with the public policy, this Court has ample power to interfere and set aside the same under Section 34 of the Act. He also contended that the learned single Judge has not considered the sufferings and loss caused to the Port Trust, which is a public authority.
6. On the other hand, Mrs. Nalini Chidambaram, learned senior counsel for the first respondent - contractor contended that inasmuch as based on the acceptable materials, the Arbitral Tribunal has passed an award and the same was considered by the learned single Judge and rejected the stand taken by the Port Trust and in view of settled position of law that the scope of interference by this Court is very limited after the enactment of Arbitration and Conciliation Act, 1996, both the appeals are liable to be dismissed.

7. We have carefully considered the rival submissions.

8. Before considering the rival claims of both the parties, let us consider the ambit and scope of jurisdiction of the Court in a petition filed under Section 34 of the Act to challenge the award of Arbitral Tribunal. Chapter VII of the Act speaks about the recourse against arbitral award.
"Chapter VII
RECOURSE AGAINST ARBITRAL AWARD
34. Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
(2) An arbitral award may be set aside by the Court only if -
(a) the party making the application furnishes proof that -
(i) a party was under some incapacity, or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
Provided that, if the decision on

matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(v) the composition of the arbitral tribunal
or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
(b) the Court finds that-
(i) the subject-matter of the dispute is not capable
of settlement by arbitration under the law for the time being in force, or
(ii) the arbitral award is in conflict with the public
policy of India. "
9. The Court's jurisdiction under the above mentioned provision has been considered by the Supreme Court in many decisions, out of which, we may refer the recent decision, namely, OIL AND NATURAL GAS CORPORATION LTD., vs. SAW PIPES LTD., reported in 2003 (7) AIC 147 (SC). After referring to the above mentioned provision, preamble of the Act, etc., their Lordships have concluded,

" 30. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award / judgment / decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (1994 Suppl.(1) SCC 644), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to:
(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality; or
(d) in addition, if it is patently illegal.
31. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void. "
10. In our case, we have already referred to the main contention of the appellant - Chennai Port Trust that the arbitral award is opposed to public policy and the same was not considered by the learned single Judge. Though the term 'public policy' has not been defined anywhere in the above referred decision, their Lordships have formulated conditions for setting aside the arbitral award. In the light of the above principle and keeping in view the limited jurisdiction of this Court, let us test the impugned arbitral award and the order of the learned single Judge confirming the same.

11. In respect of the contract, the first respondent has made a total claim for Rs.217.49 lakhs before the Arbitrators. The Chennai Port Trust also made a counter claim for Rs.100.40 lakhs. The following details show the claims of the contractor under various heads A to G and the amounts awarded by the Arbitral Tribunal.

	Amount claimed Rs. In lakhs	Amount awarded Rs. In lakhs
A. Claim in respect of change of scope of work	13,490	8.97
B. Claim in respect of expenditure involved in execution namely due to delay in approval, clearance obstruction, hindrance, idling charges for men, machineries, equipments etc.	109.85	35.43
C. Claim in respect of cost of difference in liner plates.	3.88	Rejected
D. Claim in respect of payment of interest on mobilisation advances, Bank charges etc.,	14.35	9.25
E. Claim in respect of pending bills	6.87	-
F. Interest for the above items	30.469	Allowed
G. Loss by way profit	38.581	Rejected
Total	217.490	

12. In so far as Claim No."A" i.e., claim in respect of change in scope of work is concerned, the Arbitrators after going through the evidence, came to the conclusion that the alternative design of the contractor was based on berthing impact due to 20,000 DWT vessel in an unloaded condition, in the tender documents and drawings. The Arbitrators have also arrived at a conclusion that the stand of the Port Trust amounted to revising the scope of work leading to enlarging the dimensions of the components of the berth resulting in higher costs and on this account they awarded a sum of Rs.8.97 lakhs to the Contractor. Though it was argued before the learned single Judge as well as before us that the services of the collaborator had not been utilised by the contractor, and the contractor had no experience with reference to the marine work, it is seen that R. Ganesan, one of the Directors is having 10 years experience in the execution of projects in Madras Port Trust, Southern Railway, National Airports Authority, Indian Airlines, etc., On consideration of the entire materials, particularly with reference to Indian Standard specifications and various clauses thereof, the learned Judge arrived at a conclusion that as per the directions of the Port Trust, the contractor has done the work and it is no longer open to the Port Trust to reject the claim of the Contractor in toto. We do not find any error in the said finding.

13. Regarding Claim - B, though one of the Arbitrators has not accepted the stand taken by the Contractor, admittedly, he himself accepted the fact that there was enormous delay on the part of Port Trust in entrusting the work to the Contractor. Even in his dissent note he has

stated,

"... I agree with the two co-arbitrators that substantial delays attributable to the Port Trust have occurred. My two co-arbitrators, who constitute a majority have awarded Rs.35,43,500/- as payable to the contractor. I agree with their reasoning and conclusion of the delays due to cause attributable to the Port Trust. ... "

In such a circumstance, the contra argument made by the learned counsel for the appellant is liable to be rejected. In respect of other claims, though objections were raised, we are satisfied that none of them was substantiated by placing acceptable material.

14. Regarding the counter claims, it is seen that the Port Trust made a claim under three heads, namely, Idling of Officers, technical staff and Artisan labourers due to non-attending of work, expenditure incurred in executing the balance operations, waste of departmental material. The arbitral award and the order of the learned single Judge shows that those claims have been duly considered by the arbitrators and on giving sufficient reasons all the claims were rejected. As rightly observed by the learned Judge, in view of Clause 12 of the agreement and the reasons given by the Arbitrators for rejecting the counter claims, we do not find any substance in the stand taken by the appellant in so far as their counter claims are concerned.

15. As rightly pointed out by the learned senior counsel for the first respondent, the arbitrators were satisfied with the fact that collaborator was consulted at the appropriate time and the Port Trust alone was responsible for the delays. In the light of the factual details and in view of the principle laid down by the Supreme Court in ONGC case (2003 (7) AIC 147 (SC), we do not find any valid ground to set aside the arbitral award. There is no material to show that it is patently in violation of any statutory provision and also there is no sufficient material to show that the award is unfair, unreasonable and patently illegal warranting interference by this Court.

In the light of what is stated above, we do not find any merit in the above appeals; accordingly, both the appeals fail and are dismissed. No costs.

Index:Yes
Internet:Yes
kh

To
1. The Sub-Asst. Registrar
Original Side, High Court, Madras.

2. The Record Keeper
V.R. Section, High Court, Madras.